Supreme Court, U.S.
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No. 01-873

IN THE
SUPREME COURT OF THE UNITED STATES

EDWIN R. BOWEN, WARDEN,

Petitioner,

v.

KEVIN RICE,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Certiorari should be denied for any and/or all of the following reasons:

(1) This is not a proper case to resolve the questions presented, because the finding by a State reviewing court that defendant's Illinois Post-Conviction ["PC"] Petition was untimely -- which is the State's basis for asserting the PC was not "properly filed," and hence that the federal habeas was untimely -- is patently invalid, because the State Appellate Court's decision that found untimeliness upon a theory that the reviewing court could consider this issue, even though not raised below, has been totally overruled and invalidated by a subsequent Illinois Supreme Court decision, People v. Wright, 189 Ill.2d 1, 723 N.E.2d 230, 243 Ill. Dec. 198 (1999), holding that, where not raised below, the untimeliness issue is waived and the Illinois State Post-Conviction ["PC"] Petition is timely.

(2) The 7th Circuit decision the State relies upon to show a conflict within the 7th Circuit, Brooks v. Cowan, ___ F.3d ___, 2002 U.S. App. LEXIS 1556 (7 Cir. 2002), is not final, as it may be re-evaluated; a Petition for Rehearing *en banc* (filed 2/02/02) is pending in Brooks v. Cowan.

(3) Petitioner's position depends on applying here, the Harris v. Reed, 489 U.S. 255 (1989), analysis from the procedural default context; this is completely wrong, because per this Court's decision in Artuz v. Bennett, 531 U.S. 4 (2000), the Harris v. Reed doctrine does not apply in the federal habeas limitations tolling context.

(4) The Illinois PC Statute's Limitations provision, on the basis of which the State Appellate Court held the PC Petition was untimely [see (1), above] -- on which decision the federal court relied to hold the PC Petition was not "properly filed" and hence, that the federal habeas petition was untimely -- is unconstitutional, as it violates the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution.

Introduction

The position of the State in its Petition for Certiorari, p. 17, and in its Supplemental Brief ["Supp.Br."] in support thereof, p. 1 -- on which its argument totally depends -- is that under Harris v. Reed, 489 U.S. 255 (1989) (per the State, "in the realm of procedural default," Supp.Br. p. 1), where a defendant's State collateral attack is denied both on the merits and based on untimeliness, untimeliness prevails; and this means that the State collateral attack here was not properly filed.

Interesting though this proposition may be, this case is

not a proper vehicle for this Court to resolve this issue[1] -- because, here, there never was a valid determination by any State Court (i.e., trial court, or Appellate Court), that the PC was not timely filed.

(1) This is not a proper case to resolve the questions presented, because the finding by a State reviewing court that defendant's Illinois Post-Conviction ["PC"] Petition was untimely -- which is the State's basis for asserting the PC was not "properly filed," and hence that the federal habeas was untimely -- is patently invalid, because the State Appellate Court's decision that found untimeliness upon a theory that the reviewing court could consider this issue, even though not raised below, has been totally overruled and invalidated by a subsequent Illinois Supreme Court decision, People v. Wright, 189 Ill.2d 1, 723 N.E.2d 230, 243 Ill. Dec. 198 (1999), holding that, where not raised below, the untimeliness issue is waived and the Illinois PC Petition is timely.

First, here, the trial court dismissed the PC action, SOLELY on the merits. The issue of timeliness was not raised by the State in the trial court, nor was it addressed by the trial court sua sponte.

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[1] For defendant's substantive response to this Harris v. Reed approach, see Point (3), infra. This Court rejected this approach, 9-0, in Artuz v. Bennett, 531 U.S. 4 (2000).

Second, the State Appellate Court ruled against defendant solely on the merits, in People v. Rice, No. 1-97-1181, pp. 1-8,[2] and then ruled that it could evaluate timeliness (raised for the first time by the State in its Appellee's Brief in defendant's PC appeal), even though the issue had not been raised or decided in the trial court. (Id., pp. 8-12) This ruling is totally invalid. The Illinois Supreme Court's position is unequivocally stated in People v. Wright, 189 Ill.2d 1, 723 N.E.2d 230, 243 Ill.Dec. 198 (1999), holding that when the State does not raise the issue of untimeliness of a PC Petition in the trial court -- thereby denying defendant an opportunity to demonstrate that defendant was not "culpably negligent" under the State PC statute, i.e., 725 ILCS 5/122-1, that permits under certain circumstances, for a PC petition to be considered timely filed, at a time that would otherwise be late filing -- the State can not raise that issue on appeal, and hence the PC is treated as timely filed. Id. at 236, 243 Ill.Dec. at 204.

Hence, under decisional law of the Illinois Supreme Court, as it now exists, the PC Petition here was timely filed.

Thus, defendant's PC Petition was timely filed under Illinois law; accordingly, it was "properly filed" under 28

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[2] This May 17, 1999 decision of the Appellate Court is a non-published Order, of no precedential worth under Ill.Sup.Ct. Rule 23.

U.S.C. § 2244(d)(1)(A) & 2244(d)(2), for federal habeas corpus timeliness purposes.[3]

(2) The 7th Circuit decision the State relies upon to show a conflict within the 7th Circuit, Brooks v. Cowan, ___ F.3d ___, 2002 U.S. App. LEXIS 1556 (7 Cir. 2002), is not final, as it may be re-evaluated; a Petition for Rehearing *en banc* (filed 2/02/02) is pending in Brooks v. Cowan.

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[3] If the matter had been raised in the State PC trial court, a court might have found no culpable negligence by defendant. For example, in People v. Sowewimo, No. 1-99-2359 (Ill.App.Ct., 1st Dist., 1st Div., Jan. 28, 2002) (unpublished Order per Ill.Sup.Ct.Rule 23), the Appellate Court affirmed that portion of the PC trial court's ruling that the delay in filing the PC petition was not due to Sowewimo's culpable negligence; the Appellate Court wrote:

> "However, in deciding the culpability of Sowewimo [re time of filing PC], we recognize that, prior to Rissley, Illinois court decisions interpreting 'culpable negligence' 'flip flopped.' In the past, even our most learned lawyers and judges have been mistaken on this issue." Sowewimo, supra, at 6. (Emphasis added.)

["Rissley" is People v. Rissley, 3/15/01, # 82536, Ill.Sup.Ct., pet for rhrg pndg.]

The State's reliance (Supp.Br. pp. 1-3), on the Feb. 2, 2002 decision of Brooks v. Cowan, ___ F.3d ___, 2002 U.S. App. LEXIS 1556 (7 Cir. 2002), as demonstrating a conflict within the 7th Circuit with respect to the AEDPA's "properly filed" tolling exception, is premature, because that decision is not final. A petition for rehearing *en banc* was filed in the 7th Circuit on Feb. 15, 2002, and that petition remains pending as of March 12, 2002. Hence, certiorari should not be granted to resolve any purported conflict within the 7th Circuit, while that Circuit itself still has an opportunity to resolve the conflict on rehearing in Brooks v. Cowan.

(3) Petitioner's position depends on applying here, the Harris v. Reed, 489 U.S. 255 (1989), analysis from the procedural default context; this is completely wrong, because per this Court's decision in Artuz v. Bennett, 531 U.S. 4 (2000), the Harris v. Reed doctrine does not apply in the federal habeas limitations tolling context.

The State's assertion that the Harris v. Reed principle from the realm of procedural default, applies to the timeliness issue (see *Introduction*, pp. 2-3, supra), confuses the doctrine of when, on the merits, a federal habeas corpus issue is deemed procedurally defaulted because although the State court decided the merits, the issue was alternatively resolved in the State court on an adequate, independent State law basis -- with the issue at hand, which is, whether the federal habeas court can find the federal habeas corpus petition was filed within 1

year of final disposition of a properly filed State court collateral attack such as a PC petition.

The reason for the difference is self-evident, once it is understood that Congress, in enacting the limitations and tolling provisions of the AEDPA, intended to be fair by providing the State Court litigant 1 year after his collateral attack has been denied by the highest State court considering the cause. Applying the Harris v. Reed doctrine to the question of "properly filed" for habeas timeliness purposes, would defeat the fairness intended by Congress.

Assume a State collateral attack is filed, and the State asserts it is late. It is litigated, and the trial court rules, pursuant to State law exceptions (e.g., lack of culpable negligence by defendant), that the filing is timely. The State appeals, and the first State reviewing court also rules it is timely. The cause proceeds to the State's highest court. Surely, more than one year of litigation would have occurred. Then, the highest State court rules the collateral attack does not qualify under the State exception and therefore, it was late. To hold that hence, it was not "properly filed" for AEDPA limitations tolling purposes -- even though defendant delayed filing his habeas in federal court because he was still litigating his collateral attack in State court -- would be so inherently unfair as to violate due process.

Cases decided before Artuz v. Bennett, 531 U.S. 4

(2000), i.e., Fernandez v. Sternes, 227 F.3d 977 (7 Cir. 2000), and Jefferson v. Welborn, 222 F.3d 286 (7 Cir. 2000) (see Supp.Br. p. 2),[4] are inapplicable.

Accordingly, the State's position in this regard is plainly wrong, because application of the Harris v. Reed analysis to the federal habeas limitations tolling context, conflicts with this Court's unanimous decision in Artuz v. Bennett, supra.

Decisions holding in accord with the Rice v. Bowen, 264 F.3d 698 (7 Cir. 2001), approach in this regard and contra to the Brooks decision cited by the State, include the following authoritative decisions of other U.S. Courts of Appeals that have addressed the issue, all, rejecting application of Harris v. Reed analysis to context at hand: Smith v. Ward, 209 F.3d 383 (5 Cir. 2000); Emerson v. Johnson, 243 F.3d 931 (5 Cir. 2001); Dictado v. Ducharme, 244 F.3d 724 (9 Cir. 2001); see also Nara v. Frank, 264 F.3d 310 (3 Cir. 2002).[5]

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[4] In those cases, the 7th Circuit applied Harris v. Reed in the manner the State now urges. (See Supp.Br. p. 2.)

[5] See also Snow v. Ault, 238 F.3d 1033 (8 Cir. 2001), and Hardy v. Sec'y for the Dep't of Corr., 246 F.3d 1300, 1301-02 (11 Cir. 2001), rejecting application of Harris v. Reed analysis in context of "successive" State collateral attack petitions.

(4) The Illinois PC Statute's Limitations provision, on the basis of which the State Appellate Court held the PC Petition was untimely [see (1), above] -- on which decision the federal court relied to hold the PC Petition was not "properly filed" and hence, that the federal habeas petition was untimely -- is unconstitutional, as it violates the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution.

Alternatively, the Illinois PC Statute of Limitations is unconstitutional -- yet another basis why this Court should refrain from granting certiorari.

Unconstitutionality of Illinois PC Statute of Limitations

The limitations period of the Illinois PC hearing act, 725 ILCS 5/122-1(c), is unconstitutional -- in violation of due process of law and equal protection of the laws, under the 14th Amendment to the U.S. Constitution -- because it sets up a time-table[6] that irrationally and arbitrarily treats differently, persons in essentially the identical situation. The irrationality violates due process, see Leary v. United States, 395 U.S. 6, 36

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[6] That is, persons who do appeal, have a time-period that extends until 6 months after denial of leave to appeal (or expiration of time for filing petition for leave to appeal, if none is filed), while persons who do not appeal, have 3 years from date of conviction -- whichever is sooner.

(1969),[7] and the arbitrariness (absent compelling State interest) violates the equal protection clause, see Romer v. Evans, 517 U.S. 620 (1996); cf. United States v. Jackson, 390 U.S. 570 (1968).

The Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1, et seq., requires that a petition be filed

> "[not] more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition is none is filed or more than 45 days after the defendant files his or her brief in the appeal of a sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner." 725 ILCS 5/122-1(c).

The State PC statute of limitations as it exists and was applied here, is irrational, because the length of time a person has to file a PC petition can vary immensely on a

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[7] This Court has long required rationality as a fundamental requirement of due process, striking down as violative of due process, that which is irrational. E.g., Jackson v. Virginia, 443 U.S. 307 (1979); Leary, cited in the text; United States v. Ross, 92 U.S. (23 Wall.) 281, 283-84, 23 L.Ed. 707, 708 (1876); Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35 (1910).

case-by-case basis, due to factors that have no legitimate bearing on a statute of limitations. Since under the statute, a defendant has six (6) months after the end of direct review within which to file a PC Petition, a number of variables -- outside the individual's ability to control -- substantially affect how much time one has to file for PC relief. E.g., the Administrative Office of the Illinois Courts has published statistics demonstrating that the time it takes for appeals to be resolved, differs greatly between different judicial districts.[8]

One factor affecting the time for appeals to be resolved, is the length of time it takes to obtain the transcript of a trial. Hence, in a county with an over-crowded appellate docket, transcripts may be hard to come by expeditiously, whereas in other counties, where there are fewer appeals, transcripts may be readily available.

These and similar factors outside the defendant's control determine how long a time one has to file for PC

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[8] See Annual Report of the Illinois Courts, Statistical Summary - 1999, pp. 141-42, compiled and published by the Administrative Office of the Illinois Courts. This official document demonstrates that some appeals in some Illinois Appellate Districts are disposed of in less than 6 months from when the case was filed, and/or from when briefs were filed, while others are not disposed of for 3 years or even more thereafter.

relief. Since the time allowed by this statute of limitations fluctuates wildly depending upon how long it takes for an appeal to be resolved, and there are so many uncontrollable variables involved, the statute is irrational and hence, unconstitutional.

There is no rational basis, and no compelling State interest, why some persons should have 3 years to file a PC, and some, 2 years, and some, 18 months, and some, only 1 year. This arbitrary irrationality violates both due process of law and equal protection of the laws.

Such an arbitrary and irrational statutory set-up is unconstitutional, in violation of the 14th Amendment. (See cases and discussion at pp. 9-10, supra.)

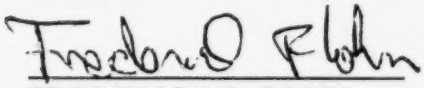
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For any and/or all of the above reasons, it would be improvident for this Court to grant certiorari; and, if certiorari is nonetheless allowed to consider the questions presented by the Petitioner, then this Court should also consider the issue whether the Illinois PC statute of limitations that forms the basis of the determination that the habeas was untimely, is unconstitutional.

CONCLUSION

For any and/or all of the foregoing reasons, certiorari should be denied. Alternatively, if certiorari is allowed, then this Court should also consider the issue of whether the Illinois PC Statute of Limitations is unconstitutional.

Respectfully submitted,



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Dated: March 16, 2002